A

RE TEOH SEOW CHIEW; EX P AMBANK (M)

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
B [BANKRUPTCY PETITION NO: D1-29-571-2004]
15 DECEMBER 2008

BANKRUPTCY: *Receiving and adjudication orders - Proof of debt - Appeal against - Appeal pursuant to s. 92 of Act - Whether not requiring prior consent of Director General of Insolvency - Bankruptcy Act 1967, ss. 38(1)(a), 42, 92(2), rr. 2, 26, 28 to Schedule C thereof*

C

WORDS & PHRASES: *"Orders in bankruptcy matters" - "Any person aggrieved" - Section 92 Bankruptcy Act 1967*

D A receiving order and an adjudication order were made against the judgment debtor ('debtor') herein, following which the judgment creditor ('creditor') submitted its proof of debt to the Director General of Insolvency ('DGI') stating the debt as being in the sum of RM1,268,688.50. Having examined the proof, the DGI
E however admitted only a smaller sum of RM55,151.31. The creditor applied to the Bankruptcy Court pursuant to r. 28 of Schedule C ('Schedule') of the Bankruptcy Act 1967 ('the Act') to reverse or vary the decision of the DGI, whereupon the application was allowed and the amount of debt was restored to
F RM1,268,688.50 by the learned Senior Assistant Registrar ('SAR'). Being dissatisfied, the debtor appealed to the Judge in Chambers. Before the appeal could proceed, the creditor however raised two preliminary objections – essentially arguing that the debtor had no *locus standi* to appeal pursuant to s. 92 of the Act,
G and even if he had, he is not legally competent to appeal since he has not obtained the prior sanction of the DGI as required by s. 38(1)(a) of the Act.

Held (dismissing preliminary objections):

H **(1)** This court is mindful of the dual requirements imposed by s. 92 that need to be satisfied by a potential appellant by reason of the phrases 'Orders in bankruptcy matters' and 'any person aggrieved' found in sub-s. 2 of the said section. However, on the facts, the order of the SAR under r. 28 is
I clearly an order in a 'bankruptcy matter'. Likewise, it is plain

and obvious that the debtor is a 'person aggrieved' as the proven debt against him has since been increased to a substantially larger amount. (paras 13 & 14)

(2) The creditor's argument that since r. 28 allows only a creditor to apply to the Bankruptcy Court to reverse or vary the decision of the DGI, it is therefore implicit in s. 92 that, the only aggrieved person, besides the DGI, is the creditor and no one else – is unacceptable. The phrase 'any person aggrieved' in subs. (2) of s. 92 cannot be given such a narrow interpretation. (para 16)

(3) By the provisions of s. 92(2), and the authorities, once a person succeeds in satisfying the court the following requirements, namely that the order of the registrar is an order in a bankruptcy matter, and that he is a person aggrieved by that order (as in the present case), he has a right to appeal to the judge against the decision of the registrar pursuant to s. 92. He cannot be denied this right to appeal. A debtor or a bankrupt, is not required to obtain the prior sanction of the DGI when appealing to the judge pursuant to s. 92 of the Act (*Re Khoo Kim Hock; Re Lim Tai Nian, ex parte Kewangan Utama Bhd*). (paras 15, 17 & 19)

Case(s) referred to:
Re Khoo Kim Hock [1974] 2 MLJ 29 ***(refd)***
Re Lim Tai Nian, ex parte Kewangan Utama Bhd [2002] 1 CLJ 41 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 38(1)(a), 42, 92(1), (2), 93(3), 105(1)

For the judgment creditor - Hargopal Singh; M/s Hargopal Singh & Co
PC Chew Singh; M/s Kwong & Allan
For the Director General of Insolvency - Rohatul Akmar (Intan Rafidah with her); SFCs

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Hishamudin Mohd Yunus J:

[1] Enclosure 24 is an appeal to the judge in chambers by the debtor pursuant to s. 92 of the Bankruptcy Act 1967 against the decision of the learned senior assistant registrar ('the registrar'). On

A 14 January 2008 the registrar had allowed with costs the application by the creditor in encl. 19. The application *vide* encl. 19 was made by the creditor pursuant to r. 28 of Schedule C ('the Schedule') of the Bankruptcy Act to reverse or vary the decision of the Director General of Insolvency of 24 September B 2007. The decision of the Director General of Insolvency was made pursuant to r. 26 of the same Schedule.

[2] Section 92 of the Bankruptcy Act states:

C **92. Appeals in bankruptcy**

(1) The court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

(2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal in the same way as D orders of the High Court in other matters are for the time being appealable.

(3) For the purposes of this section the Director General of Insolvency shall be deemed to be aggrieved by the refusal of any application made by him to the court. E

[3] Section 42 of the Bankruptcy Act states:

Rules as to proof of debts

F 42. The rules in Schedule C shall be observed with respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs and other matters.

[4] It will be noted that s. 42 speaks of the application of G Schedule C of the Act with regard to the proving of debts by creditors before the Director General of Insolvency. In order to appreciate the rules as stipulated by Schedule C, in particular, as to the rights of creditors to prove their debts before the Director General of Insolvency, I shall set out rules 1 to 4 of the Schedule. H They are as follows:

1. Every creditor shall prove his debt as soon as may be after the making of a receiving order.

2. A debt may be proved by delivering or sending through the I post in a prepaid letter to the Director General of Insolvency an affidavit verifying the debt.

3. The affidavit may be made by the creditor himself or by some person authorized by or on behalf of the creditor or his estate. If made by a person so authorized, it shall state his authority and means of knowledge.

4. The affidavit shall contain or refer to a statement of account showing the particulars of the debt and shall specify the vouchers, if any, by which the same can be substantiated. The Director General of Insolvency may at any time call for the production of the vouchers or books of account.

[5] Rule 26 of the Schedule imposes on the Director General of Insolvency a duty to examine the proof of debt filed before him by the creditor and to make a decision as to whether to admit or to reject the proof. This rule states:

26. The Director General of Insolvency shall examine every proof and the grounds of the debt, and in writing admit or reject it in whole or in part or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection.

[6] If a creditor is dissatisfied with a decision of the Director General of Insolvency pursuant to the above r. 26 in admitting or rejecting a proof, he may make an application to the Bankruptcy Court pursuant to r. 28 of the Schedule seeking to reverse or to vary the decision of the Director General of Insolvency. Rule 28 of the Schedule states:

28. If a creditor is dissatisfied with the decision of the Director General of Insolvency in respect of a proof, the court may on the application of the creditor reverse or vary the decision.

[7] In the present case, a receiving order and an adjudication order were made against the debtor on 29 December 2005. Subsequently, Ambank (M) Berhad, a creditor, pursuant to r. 2 of the Schedule, filed an affidavit verifying the debt (debt owing to the creditor by the debtor). The affidavit is known as the proof of debt and it states the debt as being in the sum of RM1,268,688.50. The Director General of Insolvency, as required by rule 26 of the Schedule, examined the proof; but he admitted only a much smaller sum of RM55,151.31.

[8] Being dissatisfied with the decision of the Director General of Insolvency, the creditor, pursuant to r. 28 of the Schedule, filed an application before the Bankruptcy Court, seeking the court's order to reverse or to vary the decision of the Director General. This application was *via* encl. 19 and was heard before the senior assistant registrar. The registrar, having heard the application, allowed it and varied the decision of the Director General in that the registrar ordered that the amount of debt admitted be increased to the sum of RM1,268,688.50, that is to say, the registrar restored the amount of debt as originally stated in the proof lodged by the creditor before the Director General of Insolvency.

[9] The debtor was dissatisfied with the decision of the registrar and he appeals to the judge in chambers pursuant to s. 92 of the Bankruptcy Act.

[10] At the commencement of the hearing of this appeal, Encik Hargopal Singh, the learned counsel for the creditor, raised two preliminary objections. The first preliminary objection is that the debtor has no locus to appeal pursuant to s. 92. The second preliminary objection is that, even if the debtor has the locus to appeal pursuant to s. 92, still, he is not legally competent to appeal as he has not obtained the prior sanction of the Director General of Insolvency as required by s. 38(1)(a) of the Bankruptcy Act.

[11] Now, s. 38(1)(a) provides:

> **Consequences of refusal of discharge**
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> 38(1) Where a bankrupt has not obtained his discharge:
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> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;

[12] Having called for and heard submissions, I have dismissed both the preliminary objections with costs. I shall now give my grounds.

[13] As to the first preliminary objection, I am mindful of the dual requirements imposed by s. 92 that need to be satisfied by a potential appellant by reason of the phrases 'Orders in bankruptcy matters' and 'any person aggrieved' found in subsection (2) of the

said section. Bearing these requirements in mind, I am of the view that as to the first requirement it is plain and obvious that the order of the registrar pursuant to r. 28 of the Schedule is an order in a bankruptcy matter, and as such I do not propose to discuss further on this.

[14] As to the second requirement, it is, to my mind, equally plain and obvious that the debtor is a 'person aggrieved' as the proven debt against him is now increased to a substantially much larger amount. Clearly such a decision is adverse to the interest of the debtor/bankrupt.

[15] Going by the provision of subsection (2) of s. 92, once a person succeeds in satisfying the court the following requirements, that is to say:

(a) that the order of the registrar is an order in a bankruptcy matter (which is so in the present case); and

(b) that he is a person aggrieved by that order of the registrar (which is so in the present case),

he has a right to appeal to the Judge against the decision of the registrar pursuant to s. 92. He cannot be denied this right to appeal. Whether or not he can succeed in the appeal is a different matter.

[16] The learned counsel for the creditor argues that since rule 28 allows only the creditor – and not the debtor - to apply to the Bankruptcy Court to reverse or to vary the decision of the Director General of Insolvency, it is, therefore, implicit in s. 92 that the only aggrieved person, besides the Director General of Insolvency (who is deemed by subsection (3) of s. 92 to be aggrieved by the refusal of any application made by him to court), for the purpose of s. 92 and in the context of the present case, is the creditor and no one else. With respect I am unable to accept this argument. In my judgment the phrase 'any person aggrieved' in subsection (2) of s. 92 cannot be given such a narrow interpretation.

[17] I shall now move on to the second preliminary objection of the learned counsel for the creditor. In my judgment, based on the authorities, where a debtor/bankrupt appeals to the judge pursuant to s. 92, he is not required to obtain the prior sanction

of the Director General of Insolvency (as required by s. 38(1)(a)). In *Re Khoo Kim Hock* [1974] 2 MLJ 29 Mohd Azmi J (as he then was) dealt in depth on the issue as to the nature of the proceeding that requires the bankrupt to obtain the prior sanction of the Official Assignee/Director General of Insolvency. This case (that is cited) concerns an application by an undischarged bankrupt for an order annulling the adjudication order under ss. 92(1) and 105(1) of the Bankruptcy Act 1967 for reasons that he ought not to have been adjudged a bankrupt as he was not indebted to anyone and that his own petition was filed under a misconception of law and liability towards his alleged creditor. I do not, however, propose to quote in full Mohd Azmi J's learned discourse on the subject. I shall be selective. I will only refer to the passages in his judgment that are relevant for the purpose of this appeal. His lordship began the inquiry in the following manner:

> The first question for determination is whether the requirement of sanction of the Official Assignee under section 38(1)(a) applies only to a bankrupt's ordinary claims, ie, maintaining court action involving third parties, or does it extend to all actions including proceedings, as in the present case, where the bankrupt is challenging the very validity of the adjudication order by which he has been adjudged bankrupt. Having considered the provisions of the Bankruptcy Act as a whole and the section itself, it is my considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he is seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction.

[18] Thereafter, the learned judge made the following observations in relation to s. 92:

> Further, there is nothing in sections 33, 92 or 105 to indicate that it is the intention of the legislature to require prior sanction of the Official Assignee before a bankrupt can seek relief under those provisions. Under section 33(1), a bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and there is no legal requirement that for this purpose he should first obtain the sanction of anyone. This is also the case where an application is made to the court under sections 92(1) and 105(1) of the Act.

And, at a later part of the judgment, the learned judge made the following ruling:

> Accordingly, just as right of action in respect of personal damage and injury (which is excluded under section 38(1)(a) from prior sanction) is a cause of action to the benefit of which the estate is not entitled, the application in the present case is one which from its nature does not vest in the Official Assignee. Under the circumstances, I hold that section 38(1)(a) does not apply to an application under sections 92(1) and 105(1) of the Bankruptcy Act, where a bankrupt is seeking the court's discretion to review, rescind or vary any order made by it, and as such no previous sanction of the Official Assignee is necessary in the present case.

[19] The judgment of Mohd Azmi J in *Re Khoo Kim Hock* was followed by Ian HC Chin J in *Re Lim Tai Nian, ex parte Kewangan Utama Bhd* [2002] 1 CLJ 41.

[Preliminary objection dismissed with cost.]